Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978

No. 78-1578

KAREN L. LOSEGO, HOWARD ARNOLD, ALFRED M. GLASS, BLANCHE LARRICK, and ALLEN FLOYD,
Petitioners,

vs.

GUERNSEY COUNTY BOARD OF EDUCATION, LEONARD PATTERSON, and JAMES R. ADDISON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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To the Supreme Court of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above entitled case on January 17, 1979, wherein said Court overruled their Motion for an Order Directing the Court of Appeals for Guernsey County to Certify its Record.

OPINIONS BELOW

The Opinion of the Court of Appeals for Guernsey County, Ohio is unreported and is printed in the Appendix hereto, *infra*, page A4. The Opinion of the Court of

Common Pleas for Guernsey County, Ohio is also unreported and is printed in the Appendix hereto, *infra*, page A18. No opinion or judgment was handed down by the Supreme Court of the State of Ohio in overruling Petitioners' Motion for an Order Directing the Court of Appeals for Guernsey County to Certify its Record.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio overruling Petitioners' Motion for an Order Directing the Court of Appeals for Guernsey County to Certify its Record was entered on January 17, 1979. All prior appeals, applications and motions were timely filed.

The instant petition centers around the validity of a statute of the State of Ohio (Section 3501.38 of the Ohio Revised Code) which was drawn into question on the ground of its being repugnant to the Constitution of the United States, the decision being in favor of its validity. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

The petition presents one question under the Constitution of the United States:

Whether or not Section 3501.38(F) of the Ohio Revised Code is unconstitutional on its face and as applied in that by providing for the invalidation of an entire petition paper upon the signing of such by an unqualified person, said statute constitutes an infringement by the state upon those persons' right to petition who signed the invalidated petition paper and were qualified.

STATUTE INVOLVED

The statute, Section 3501.38(F) of the Ohio Revised Code, the validity of which is drawn into question, is as follows:

> All declarations of candidacy, nominating petitions, or other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of becoming a candidate for any nomination or office or for the holding of an election on any issue shall, in addition to meeting the other specific requirements prescribed in the sections of the Revised Code relating thereto, be governed by the following rules:
>
> * * * * *
>
> (F) If a circulator knowingly permits an unqualified person to sign a petition paper or permits a person to write a name other than his own on a petition paper, that petition paper is invalid; otherwise the signature of a person not qualified to sign shall be rejected but shall not invalidate the other valid signatures on the paper.

STATEMENT OF THE CASE

The instant cause had its origins in a controversial consolidation and merger of two adjacent public school districts located in Guernsey County in the southern portion of Ohio. At a 1976 meeting of the Guernsey County Board of Education (hereinafter referred to as the Board), a resolution of consolidation was adopted by unanimous vote of the Board members present. However, under the procedures outlined in Section 3311.26 of the Ohio Revised Code (hereinafter referred to as the Code), qualified elec-

tors of the territory voting in the last general election, who for whatever reason disagreed with said resolution, possessed the right to circulate and sign petitions of referendum to be filed with the superintendent of the Board in order to ultimately have the issue of whether or not to allow consolidation placed on the ballot for a vote of the people.

In this regard Petitioners Karen Losego, Howard Arnold, and Alfred M. Glass, all three of whom are residents, taxpayers and qualified electors of Guernsey County, along with other concerned citizens, circulated part-petition papers to be signed and filed within the requirements of Section 3311.26. Included in the signatures gathered were those of Petitioners Blanche Larrick and Allen Floyd (hereinafter referred to as either Larrick and Floyd or as petitioners), both being duly qualified electors of the territory.

During the Board's review of the approximately 69 referendum petitions filed, dozens of signatures obtained were eliminated by means of the invalidation of entire part-petition papers (each usually containing 30-40 signatures) *in toto* as provided for under the terms of Section 3501.38(F) of the Code (Petitioners seek writ for purpose of inquiry into the constitutionality of subdivision (F)) because, among other reasons, it was discovered that certain wives of qualified electors had taken it upon themselves to sign the names of their husbands on the petition paper presented, their actions being knowingly permitted by the circulator and thus in violation of subdivision (F) of the above-mentioned section. Among the valid signatures which were not involved in the above-mentioned violative activity but which were nonetheless discarded by the Board as being a portion of invalidated part-petitions were those of Larrick and Floyd.

At the time of trial, it was stipulated that the mentioned irregularities occurred without the knowledge of said petitioners. However, the trial court upheld the constitutionality of Section 3501.38 (Trial Court Opinion App. pp. A25-26). Thus the express desire of Larrick and Floyd to exercise their right to petition was rejected because of occurrences beyond their control. The Court of Appeals for Guernsey County affirmed the trial court's judgment against the petitioners (Appellate Opinion App. pp. A4-A18). The Supreme Court of the State of Ohio refused the certification of the Record on Appeal (Judgment of Supreme Court App. p. A1).

REASONS FOR GRANTING WRIT

The violation by the Board under the auspices of Section 3501.38(F) of the Code of the right to petition the government possessed by both Larrick and Floyd is the crux of the instant Petition for Writ. Simply stated, a scrutiny of the constitutionality of subdivision (F) of Section 3501.38 on its face and as applied is respectfully sought.

The right to petition the government for a redress of grievances under the First Amendment is without a doubt one of the most precious liberties safeguarded by the Bill of Rights, *See, United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967), and along with the freedom of religion, speech, press and assembly is a "preferred" right of the Federal Constitution. *See, Adderley v. Florida*, 385 U.S. 39 (1966) (From separate opinion of Douglas *J.*, Warren, *Ch. J.*, Brennan and Fortas *JJ.*). This right is protected from infringement by the States as well as under the Fourteenth Amendment. *See, United Mine Workers, supra.*

On its face Section 3501.38(F) of the Code flagrantly disrupts this "preferred" right. Under subdivision (F), a circulated part-petition paper, including all valid signatures thereon, can be discarded in its entirety, if it is found that either an unqualified person signed the paper or that a person signed a name other than his or her own, and that either of these two mentioned irregularities was knowingly permitted by the circulator of such. However, if either irregularity occurs without the knowledge of the circulator, only the invalid signature and not the entire part-petition is eliminated. Therefore, the State or its agent bases its right to infringe upon an individual's duly exercised right to petition (i.e., signing a part-petition as a qualified elector) on a finding that the circulator of the paper knowingly permitted the irregularities listed in Section 3501.38(F). Petitioners would contest such a result.

Petitioners readily admit that the State has a genuine interest in protecting the integrity of the election process from chicanery and fraud. However, they submit that the regulation by the State under the terms of Section 3501.38(F) of the right to petition held by an individual is clearly unreasonable for the reasons given below.

In *Thomas v. Collins*, 323 U.S. 516, *reh. den.*, 323 U.S. 819 (1945), which dealt with the unconstitutionality of a statute requiring appellant to obtain a license before soliciting workers to join a union, the Court states in pertinent part:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given

> in our scheme to the great, the indispensable democratic freedoms (i.e., right to petition, freedom of religion, etc.) secured by the First Amendment. (Citations omitted). That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. (Citations omitted).
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. (Parenthetical material added). 323 U.S. 529-530.

Furthermore, if a compelling state interest is proven to exist, "it would plainly be incumbent upon (the State) to demonstrate that no alternative forms of regulation would (further the compelling state interest) without infringing First Amendment rights (ie., the right to petition)" *Sherbert v. Verner*, 374 U.S. 398 at 407 (1963) (Parenthetical material added).

In the instant case, petitioners submit that subdivision (F) of Section 3501.38 as drafted and promulgated does not base its protection of the election process on a danger sufficiently "clear and present" to justify any infringement of the right to petition held by Larrick and Floyd. As noted earlier, if the irregularities had occurred without the knowledge or permission of the circulator, the petition papers containing their respective valid signatures would have remained valid with the elimination of the invalid names only. However, Larrick and Floyd, as well as all other individuals who properly exercise their right to petition by way of referendum, are penalized by subdivision (F) for knowledge of irregularities possessed not by them

but by a third party, namely, the circulator. Petitioners submit if the State finds no compelling state interest to deprive an individual of his or her properly exercised right to petition when irregularities of others are committed without the knowledgeable permission of the circulator, then such an interest does not automatically occur when the circulator does knowingly permit such. This is especially true when individuals such as Larrick and Floyd are innocent of foul play or knowledge of such. The right to petition is too precious a liberty to be snuffed out because of the actions of others. *See, Thomas v. Collins, supra.*

If we assume *arguendo* that the State possesses a compelling state interest to deprive Larrick and Floyd of their right to petition under the circumstances of the instant case, then it is submitted that an alternative form of regulation exists which would further said interest and yet preserve the petitioners' First Amendment rights, thus making Section 3501.38(F) unconstitutional under the dictates of *Sherbert v. Verner, supra.* This alternative is to simply eliminate the particular invalid signature only and penalize the circulator through an aggressive criminal process. This would effectively deter a circulator from permitting wrongdoing he is aware of and also cancel out an unqualified exercise of the right to petition. However the rights of others would be properly left unhindered.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated January 17, 1979)

No. 78-1419

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

KAREN L. LOSEGO *et al.*,
Appellants,

vs.

GUERNSEY COUNTY BOARD OF EDUCATION *et al.*,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR GUERNSEY COUNTY, TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated January 17, 1979)

No. 78-1419

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

KAREN L. LOSEGO *et al.*,
Appellants,

vs.

GUERNSEY COUNTY BOARD OF EDUCATION *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR GUERNSEY COUNTY

This cause, here on appeal as of right from the Court of Appeals for Guernsey County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF GUERNSEY COUNTY, OHIO

(Filed September 12, 1978)

Case No. CA-571

IN THE COURT OF APPEALS
FOR GUERNSEY COUNTY
FIFTH APPELLATE DISTRICT

KAREN L. LOSEGO, *et al.*,
Plaintiff-Appellants,

vs.

GUERNSEY COUNTY BOARD OF EDUCATION, *et al.*,
Defendants-Appellants.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, all three assigned errors are overruled. The judgment of the Common Pleas Court of Guernsey County, Ohio, is affirmed.

/s/ DAVID D. DOWD JR.
/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
Judges

OPINION OF THE COURT OF APPEALS OF GUERNSEY COUNTY, OHIO

(Filed September 12, 1978)

Case No. CA-571

IN THE COURT OF APPEALS
FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KAREN L. LOSEGO, *et al.*,
Plaintiff-Appellants,

vs.

GUERNSEY COUNTY BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

OPINION

DOWD, J.

This appeal involves a consolidation of the *entire* Zane Trace Local School District and the *entire* Madison Local School District into a newly created school district now known as the East Guernsey Local School District.

The act of consolidating the two districts was taken by the Guernsey County Board of Education pursuant

to the provisions of R.C. 3311.26[1] and was completed late in December of 1976. On January 4, 1977, the plaintiffs-appellants filed an action in the Common Pleas Court of Guernsey County alleging procedural, substantive and constitutional defects in the action by which the consolidation was accomplished. After a lengthy hearing, the trial court denied all relief sought and the plaintiffs appellants now prosecute an appeal[2] with the following assignments of error.

---

1. R.C. 3311.26 provides in part as follows:

"A county board of education may, by resolution adopted by majority vote of its full membership, propose the creation of a new local school district from one or more local school districts or parts thereof. Such proposal shall include an accurate map showing the territory affected. After the adoption of the resolution, the county board shall file a copy of such proposal with the board of education of each school district whose boundaries would be altered by such proposal.

A county board of education proposing the creation of a new district under the provisions of this section, shall at its next regular meeting that occurs not earlier than thirty days after the adoption by the county board of the resolution proposing such a creation, adopt a resolution making the creation effective prior to the next succeeding first day of July, unless, prior to the expiration of such thirty-day period, qualified electors residing in the area included in such proposed new district, equal in number to thirty-five per cent of the qualified electors voting at the last general election, file a petition of referendum against the creation of the proposed new district."

2. The original appeal was filed in Case No. CA-544. That case was concluded by a consent entry declaring:

"By agreement of all parties, and by reason of the failure to join an interested and necessary party in this cause as required by Section 2721.12, Ohio Revised Code, to-wit: East Guernsey Local School District, this cause is hereby remanded to the Court of Common Pleas, Guernsey County, Ohio, for further proceedings according to law."

Upon remand the East Guernsey Local School District was made a party and the trial court denied all relief sought by the plaintiffs-appellants, prompting the instant appeal.

I. THE TRIAL COURT ERRED IN FINDING THAT APPELLEES HAD COMPLIED WITH THE REQUIREMENTS OF R.C. 3311.26.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MAKING SEVERAL PROCEDURAL AND EVIDENTIARY RULINGS BELOW.

III. APPELLANTS WERE DEPRIVED OF BOTH OHIO AND FEDERAL CONSTITUTIONAL RIGHTS DUE TO THE MANNER IN WHICH THE CONSOLIDATION AND INCREASED TAXES WERE IMPOSED UPON THEM.

I.

-A-

THE "ACCURATE MAP" ISSUE

In support of the first assignment of error, the appellants contend that the Guernsey County Board of Education failed to comply with the R.C. 3311.26 requirement that the consolidation proposal "shall include an accurate map showing the territory affected". Extensive testimony was produced by the plaintiffs-appellants in support of the contention that the map employed by the Guernsey County Board of Education in an attempt apparently to comply with the provisions of R.C. 3311.26 was not accurate in that it omitted some of the territory contained within each of the two school districts to be consolidated and further was not current in that it failed to incorporate the changes brought about by the completion of Interstate Routes 70 and 77. The appellees concede that the map utilized was neither perfect nor current, but contend that the map constituted "substantial compliance" with the R.C.

3311.26 requirement in view of the fact that the proposed consolidation was of the *entire* Zane Trace and Madison Local School Districts.

The trial court after pointing to the fact that the R.C. 3311.26 requirement that the "accurate map" be filed only with the existing boards of education affected by the consolidation, found that no board member of either school district, Zane Trace or Madison, was misled or misinformed by the map, inasmuch as each member was fully aware that the proposal of consolidation included both school districts *in their entirety*.

R.C. 3311.26 constitutes a grant of authority by the Ohio General Assembly to a county board of education to consolidate school districts or parts of school districts subject only to the right of the electors of the school districts so affected by the consolidation order to challenge the proposal by the timely filing of a referendum petition.

Assuming arguendo that the qualified electors in the consolidation area having standing to complain about the accuracy of the map, we review the facts. Sixty-nine referendum petitions containing 1467 signatures were timely filed with the county board of education. The 1467 signatures represented far in excess of the required 880 (35% of the electors at the last general election) needed to compel an election under the provisions of R.C. 3311.26 if none of the signatures had been disqualified. However, the fact that a sufficient number of the 1467 signatures were disqualified so as to fall below the required minimum, in no way related to the accuracy of the map. In short, no showing of prejudice was made with respect to the qualified electors of the two school districts by reason of the accuracy or inaccuracy of the map attached to the proposal.

The appellants cite *Dabkowski v. Bauman*, 175 Ohio St. 89; *State ex rel. Lantz v. Board of Trustees*, 147 Ohio St. 256; *Hoye v. Schaefer*, 77 O.L.A. 170, 148 N.E.2d 532 *Aff'd* 109 O.App. 489; and *Ohio Edison Co. v. McElrath*, 73 O.L.A. 236, 137 N.E.2d 642, for the proposition that proof of the fact that the maps utilized were in some respect inaccurate is sufficient to demonstrate failure of compliance with R.C. 3311.26 and requires that the consolidation be nullified.

Dobkowski, Lantz, Hoye, and *Ohio Edison, supra,* each involve a factual situation where only a part of a pre-existing subdivision was being severed therefrom by annexation or incorporation proceedings.

The trial court concluded that the Guernsey County Board of Education *substantially* complied with the requirements of R.C. 3311.26 with respect to the issue of the "accurate map". The court's reliance upon the doctrine of substantial compliance with respect to the school district consolidation finds support in *Smith v. Board of Education*, 97 O.A., 507, and *Stillwater v. Board of Education*, 99 O.A. 65. In *Smith, supra,* the issue was compliance with the then statutory requirement of R.C. 3311.27 (repealed January 1, 1958) to publish the enabling resolution of consolidation. Only a summary of the resolution rather than a verbatim copy of the resolution was published in *Smith.* In applying the doctrine of substantial compliance, the Hamilton County Court of Appeals declared at page 515:

". . . .

> It is said that a summary of the resolution and not the resolution itself was published. An examination of the published notice discloses that it informed the public that the county board had adopted a resolution under the authority of Section 4831-1, General Code, abolishing the Crosby, Harrison and Whitewater Local School Districts, and creating a new district. It is not claimed that the publication of the facsimile of the resolution would have more fully advised the public of the intent to abolish the three districts and create a new district, but the claim is that the statute requires the publication of the resolution and that nothing less will serve. That, it seems to us, would be sacrificing substance upon the altar of form. It is not claimed that anyone was misled by this publication and it is our opinion that under those circumstances it must be held to be a substantial compliance with the statute. We so hold. . . ."

In our view, the trial court properly applied the doctrine of substantial compliance to the "accurate map" requirement of R.C. 3311.26 in this case in view of the fact that the consolidation involved the *entirety* of the former Zane Trace Local School District and the Madison Local School District.

-B-

THE "REGULAR MEETING" ISSUE.

Those qualified electors who oppose the creation of the proposed new school district have thirty days to file referendum petitions against such creation after the adoption by the county board of education of the resolution proposing the creation. Where the qualified electors fail to file the required minimum number of signatures on such referendum petitions, the county board of education is required to adopt the resolution creating the new school district at its next *regular* meeting after the expiration of the thirty days.

The plaintiffs-appellants contend that the creation resolution adopted on December 22, 1976 was done in other than a "regular" meeting and thus not in compliance with R.C. 3311-26. The trial court found the facts with respect to the regular meeting issue to be as follows:

> "On January 5, 1976, the Guernsey County Board of Education held its annual meeting as required by §3313.14 of the Ohio Revised Code and fixed the first Monday of each month as the time for holding its regular meetings as directed in Ohio Revised Code §3313.15. Thereafter, on November 18, 1976, the Board held a special meeting with all members being present. At that special meeting, the Board adopted a resolution to consolidate the Zane Trace Local School District and the Madison Local School District in accordance with the provisions of Ohio Revised Code §3311.26. At that same meeting, the Board, by unanimous vote, also rescheduled the next regular board meeting from Monday, December 6, 1976, to Saturday, December 18, 1976.
>
> . . . .
>
> On December 9, 1976, the County Board of Education held another special meeting to review procedures relative to referendum petitions, there having been some of said petitions already received by the County Board. At that special meeting on December 9, 1976, the County Board also rescheduled the regular meeting from December 18, 1976, to December 21, 1976, for the reason that December 18, 1976, was a Saturday and the offices would not be open that day. The Resolution rescheduling to December 21, 1976, also provided that referendum petitions would be received until 4:00 p.m., on December 20, 1976. Additional referendum petitions were received by the County Board on December 17 and December 20.

> It was determined by the County Board that 880 signatures would be required to equal the statutory demand of thirty-five percent of the qualified electors voting at the last general election. Sixty-nine petition papers were in fact filed with the County Board containing more than fourteen hundred fifty names. The rescheduled regular meeting was held on December 21, 1976, and was continued for completion on the next day, December 22, 1976. At that meeting several of the referendum petition papers were rejected in toto and when it was determined by the County Board that less than 880 signers remained after all of the rejections up to that time, the County Board resolved not to certify the referendum to the Guernsey County Board of Elections. The County Board of Education then set the effective date of the consolidation of the Zane Trace School District and the Madison School District as December 22, 1976, and appointed the five members of the newly-consolidated district's board of education. . . . ."

It is apparent that the meeting of December 21, 1976, which was continued to December 22, 1976, was designated as a "regular meeting and that the meeting of December 21, 1976 was separate and distinct from the special meetings of November 18 and December 9, 1976 and was not a continuation of either of the special meetings.

Nonetheless, the plaintiffs-appellants contend that the County Board of Education is precluded by the provisions of R.C. 3313.15[3] from changing the date of holding its regular meeting as said regular meeting date is fixed in January

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3. R.C. 3313.15 provides:

"At the time of the organization meeting each board of education shall fix the time for holding its regular meetings. Regular meetings shall be at least once every two months."

at the organization meeting pursuant to R.C. 3313.14[4] and argue alternatively that the date for a regular meeting can not be changed at a special meeting once it has been fixed at the organizational meeting in January. No authority is cited for either proposition nor do we find any.

R.C. 3313.20 provides, in pertinent part, as follows:

> "The board of education shall *make such rules and regulations as are necessary for its government* and the government of its employees, pupils of its schools and all other persons entering upon its school grounds or premises. . . ." (emphasis added)

In our view, the provisions of R.C. 3313.20 when considered against the absence of a limitation in R.C. 3313.15 preventing a board of education from rescheduling regular meetings at either a subsequent regular or special meeting and the absence of a phrase, "as fixed by the board in its organizational meeting pursuant to the provisions of R.C. 3313.14" modifying the reference to "next regular meeting" in the provisions of R.C. 3311.26 require the plaintiffs-appellants' argument with respect to the regular meeting issue be rejected. No claim is made that the regular meeting date was changed in such a manner as to defeat the right of the qualified electors to petition the county board of education for a referendum election. No claim is

4. R.C. 3313.14 provides:

> "The board of education of each city, exempted village, and local school district shall meet on a day occurring during the first fifteen days of January of each year, and shall organize by electing one of its members president and another vice-president, both of whom shall serve for one year. The clerk of the board shall canvass the members of the new board no later than December thirty-first to establish the day of the organizational meeting prescribed by this section.
>
> The board of each county school district shall hold its first meeting in January of each year, and shall organize by electing one of its members president and another vice-president, both of whom shall serve for one year."

made that the change of the regular meeting date constituted an act of fraud, bad faith or an abuse of discretion and in the absence of such a claim, we find no error on the part of the trial court in concluding that the creation resolution was adopted at the "next regular meeting" in compliance with the provisions of R.C. 3311.26.

-C-

"THE CLAIM OF THE ABSENCE OF AN ACCURATE MAP AT THE SPECIAL MEETING OF NOVEMBER 18, 1976."

In support of this portion of the first assignment of error, the plaintiffs-appellants contend that there was no map in fact at the November 18, 1976 meeting of the County Board of Education when the resolution proposing the creation of the new school district was adopted. In our view, this portion of the first assignment of error is not supported by the record.

-D-

"WAS A COPY OF THE PROPOSED RESOLUTION OF THE GUERNSEY COUNTY BOARD OF EDUCATION FILED WITH THE ZANE TRACE LOCAL SCHOOL BOARD AS REQUIRED BY R.C. 3311.26?"

Plaintiffs-appellants claim that the county board of education failed to file a copy of the resolution proposing the consolidation of the school districts with the Zane Trace Local School Board in violation of R.C. 3311.26 which provides, in pertinent part, as follows:

> ". . . the county board shall file a copy of such proposal with the board of education of each school district whose boundaries would be altered by such a proposal. . . ."

Such claim is not supported by the record.

For the foregoing reasons, all portions of the first assignment of error are overruled and the first assignment of error itself is overruled.

II.

The second assignment of error constitutes a claim that the trial court erred in denying the plaintiffs a jury trial, in denying consideration of plaintiffs' motion for summary judgment, and refusing to allow plaintiffs' expert witness to testify as to the accuracy of the map.

This case proceeded to trial on the basis of an amended complaint praying for an amended injunction, mandamus, quo warranto and declaratory judgment. The relief demanded by way of declaratory judgment is injunctive in nature and therefore sounds in equity. Under such circumstances, no right to a jury trial existed. See R.C. 2311.04.

The issue of whether the trial court erred in denying consideration of plaintiffs' motion for summary judgment has been rendered moot in this case.

What error, if any, committed by the trial court in refusing to allow plaintiffs' expert witnesses to testify as to the accuracy of the map is harmless, given our declarations contained in I-A of this opinion.

For the foregoing reasons, the second assignment of error is overruled.

III.

The Guernsey County Board of Education, acting pursuant to R.C. 3311.26, appointed on December 22, 1976, a board of education for the newly created East Guernsey Local School District. On December 27, 1976, the East

Guernsey Local School Board of Education established the millage of the entire district for the tax year 1976 at 26.80 mills (exclusive of vocational millage which remained unchanged for both the Zane Trace and Madison portion of the newly created school district). The tax millage from the two former districts and the new district for 1976 follow:

DISTRICT	INSIDE MILLAGE	OUTSIDE MILLAGE	TOTAL MILLAGE
Madison Local District	3.90	23.80	27.70
Zane Trace Local District	3.30	16.00	19.30
East Guernsey Local District	3.30	23.50	26.80

The new rate for East Guernsey was placed on the 1976 duplicate by the county auditor. The tax bills, mailed early in 1977, included the new rate and were for the first half of the tax year 1976.

The plaintiff-appellants who reside in the Zane Trace portion of the East Guernsey Local School District contend that their constitutional rights under the provisions of Article XII, Section 2 of the Ohio Constitution were violated by the raising of their property taxes in excess of the 10 mill limitation without affording them the right to vote on said increase in taxation.

The authority of a newly created school district to levy beyond the 10 mill limitation a rate of tax higher than previously authorized for a portion of the newly created district at the time of the creation is well settled. *Gigandet v. Brewer*, 134 Ohio St. 86 and *Kellenberger v. Board of Education*, 173 Ohio St. 201.

In *Gigandet, supra,* the syllabus states:

"When a school district is created by a county board of education by the consolidation of two districts under the provisions of Section 4736, General Code, and after an equitable division of funds is made, a levy of a tax outside the one per cent limitation prescribed by Article XII, Section 2 of the Ohio Constitution as amended on November 7, 1933, on all the property in the new district, for the retirement of bonds issued for the erection of a school building by a vote of the people in only one of the districts in 1926, is not violative of the aforesaid constitutional provision."

In *Kellenberger, supra,* a fact situation similar to the case at hand was presented. In *Kellenberger,* the court held:

"The question presented by counsel is whether the additional levy voted outside the tax limitation in one school district is valid as to the combined district, under Section 2, Article XII of the Constitution, where the district so voting is combined with another district not included in the former district at the time of the vote and which did not vote on such levy and was not a part of the taxing district at the time of such vote.

This question must be answered in the affirmative on authority of *Gigandet v. Brewer, County Treas.,* 134 Ohio St., 86, in which the identical question was raised. . . .".

For the foregoing reasons, the claim asserted by the third assignment of error to the effect that the trial court erred in permitting the levy of 26.80 mills (exclusive of

the vocational millage) for the East Guernsey Local School District for the tax year 1976 is overruled.

Additionally, the appellants claim that their constitutional right to procedural due process was violated when the Guernsey County Board of Education failed to provide adequate notice for the proposed consolidation.

Notwithstanding the constitutional claim, no claim is made of lack of actual notice of the proposed consolidation. In fact the first referendum petitions were signed on November 19, 1976 (see defendant's exhibits B and C) one day after the resolution proposing the consolidation was adopted by the Guernsey County Board of Education.

Plaintiffs-appellants seek a declaration that R.C. 3311.26 violates constitutional due process because the property owners of the school districts are not put on notice of an impending tax increase such as occurred with respect to those owners of property in the Zane Trace portion of the newly created school district. In our view, the authorities[5] cited by the appellant for such a proposition do not support it.

The Ohio Supreme Court has previously considered the "notice" issue with respect to the constitutionality of school consolidation provisions of Ohio law and found no constitutional infirmity. See *State ex rel. Maxwell v. Schneider, et al.,* 103 Ohio St. 492. We are not disposed to reverse that holding.

For the foregoing reasons, the third assignment of error is overruled.

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5. Londoner v. Denver, 210 U.S. 373 (1908); Railroad Company v. Wagner, 43 Ohio St. 75 (1885); see generally Goldberg v. Kelly, 397 U.S. 254 (1970); 58 Am. Jur.2d 500, Notice § 17.

Having overruled all three assignments of error, the judgment of the Court of Common Pleas of Guernsey County is affirmed.

/s/ DAVID D. DOWD JR.

/s/ NORMAN J. PUTMAN

/s/ LELAND RUTHERFORD

Judges

RUTHERFORD, *P.J.* and
PUTMAN, *J.* concur.

OPINION OF THE COURT OF COMMON PLEAS OF GUERNSEY COUNTY, OHIO

(Filed July 19, 1977)

Case No. 29796

IN THE COURT OF COMMON PLEAS
GURNSEY COUNTY, OHIO

KAREN L. LOSEGO, *et al.*,
Plaintiffs,

vs.

GUERNSEY CO. BOARD OF EDUCATION, *et al.*
Defendants.

OPINION

On January 5, 1976, the Guernsey County Board of Education held its annual meeting as required by Section 3313.14 of the Ohio Revised Code and fixed the first Monday of each month as the time for holding its regular meetings as directed in Ohio Revised Code Section 3313.15. Thereafter, on November 18, 1976, the Board held a special

meeting with all members being present. At that special meeting, the Board adopted a resolution to consolidate the Zane Trace Local School District and the Madison Local School District in accordance with the provisions of Ohio Revised Code Section 3311.26. At that same meeting the Board, by unanimous vote, also rescheduled the next regular board meeting from Monday, December 6, 1976, to Saturday, December 18, 1976.

On or about November 24, 1976, the clerks of both local boards of education received copies of the resolution to consolidate and the map as directed in O.R.C. Section 3311.26. Both clerks presented same to their respective boards. The map received by both local boards was a photocopy of a map which was noticed in the office of the County Superintendent when he took office and which was dated in the year 1968. Certain markings and delineations on the map identified two areas thereon which were indicated to be the Zane Trace School District and the Madison School District. The accuracy of the map as required in O.R.C. 3311.26 is one of the issues in this case.

On December 9, 1976, the County Board of Education held another special meeting to review procedures relative to referendum petitions, there having been some of said petitions already received by the County Board. At that special meeting on December 9, 1976, the County Board also rescheduled the regular meeting from December 18, 1976, to December 21, 1976, for the reason that December 18, 1976, was a Saturday and the offices would not be open that day. The Resolution rescheduling to December 21, 1976, also provided that referendum petitions would be received until 4:00 p.m. on December 20, 1976. Additional referendum petitions were received by the County Board on December 17 and December 20.

It was determined by the County Board that 880 signatures would be required to equal the statutory demand of thirty-five percent of the qualified electors voting at the last general election. Sixty-nine petition papers were in fact filed with the County Board containing more than fourteen hundred fifty names. The rescheduled regular meeting was held on December 21, 1976, and was continued for completion on the next day, December 22, 1976. At that meeting several of the referendum petition papers were rejected in toto and when it was determined by the County Board that less than 880 signers remained after all of the rejections up to that time, the County Board resolved not to certify the referendum to the Guernsey County Board of Elections. The County Board of Education then set the effective date of the consolidation of the Zane Trace School District and the Madison School District as December 22, 1976, and appointed the five members of the newly-consolidated district's board of education.

On December 27, 1976, the new district board of education established the school millage for the tax year 1976 at 26.80 mills and certified the same to the Guernsey County Auditor. The Auditor extended this millage upon the tax duplicates for the year 1976 and billed the December, 1976 tax to include the school millage. The Guernsey County Treasurer collected these taxes and same have been distributed to the various taxing districts including the newly-consolidated district.

This action was brought by some of the plaintiffs on January 3, 1977, and by other added plaintiffs in an Amended Complaint filed February 8, 1977, asking that the consolidation be declared null and void, that injunction issue against the collection of taxes pursuant to the consolidation, and return or adjustment of the taxes collected.

Looking first to the issue of the accurate map as required by Ohio Revised Code Section 3311.26, the first paragraph of that statute reads as follows:

> "The county board of education may, by resolution adopted by majority vote of its full membership, propose the creation of a new local school district from one or more local school districts or parts thereof. Such proposal shall include an accurate map showing the territory affected. After the adoption of the resolution, the county board shall file a copy of such proposal with the board of education of each school district whose boundaries would be altered by such proposal."

In this case, it is undisputed that the Guernsey County Board of Education met on November 18, 1976, and by unanimous resolution of all five members, proposed the creation of a new local school district from two local school districts, Zane Trace and Madison. The statute provides that such proposal shall include an accurate map showing the territory affected. The testimony of the County Superintendent was that the map was dated 1968 and was found by him in the office when he was first appointed thereto. It is admitted as an Exhibit herein, and identifies by various delineations and markings areas referred to thereon as Zane Trace district and Madison district. The Court is of the opinion that the intent of the lawmakers must be determined when they prescribed that "such proposal (consolidation) shall include an accurate map showing the territory affected." How accurate is accurate? The accurate map is by statute an inclusion with the consolidation proposal. That proposal stipulates that the consolidation would include the entire districts of Zane Trace and Madison. There were no "parts thereof" to be included or excluded which might confuse the proposal. In addi-

tion, the proposal was ordered distributed to only two recipients, those being the two local school boards affected by the proposal. It appears to the Court that no board member of either school was misinformed or misled by the map, that every board member was fully aware of the fact that the proposal was intended to bring about the consolidation of the two school districts in their entirety, and that the map included with the proposal sufficiently outlined and identified those two school districts. This, the Court believes, was the intent of the legislature when an accurate map was ordered as an inclusion with the consolidation proposal. The Court, therefore, finds that the Guernsey County Board of Education substantially complied with the requirements of Ohio Revised Code Section 3311.26 and that the school officials of both local school districts were neither misled nor misinformed by the copies of the map which was included with the proposal, the original of which had been filed in this case as an Exhibit.

Second, with respect to the last sentence of the first paragraph of O.R.C. 3311.26, pertaining to the filing of copies of the proposal with the school boards of the school districts whose boundaries would be altered by such proposal, the Court finds that the clerk of the two respective boards received copies of the proposal, and, since the statute is silent as to when and in what manner the proposal was to have been delivered to the two boards, mailing copies of the proposal to the Clerk of the two boards and acknowledgment of receipt thereof by said clerks satisfied the statutory requirement.

Third, the plaintiffs herein insist that the meeting of the Guernsey County Board of Education held on December 21, 1976, and continued into the next day, December 22,

1976, was not a regular meeting of that board. The second paragraph of O.R.C. Section 3311.26 provides as follows:

> "A county board of education proposing the creation of a new district under the provisions of this section, shall at its next regular meeting that occurs not earlier than thirty days after the adoption by the county board of the resolution proposing such creation, adopt a resolution making the creation effective prior to the next succeeding first day of July, unless, prior to the expiration of such thirty-day period, qualified electors residing in the area included in such proposed new district, equal in number to thirty-five per cent of the qualified electors voting at the last general election, file a petition of referendum against the creation of the proposed new district."

As stated in the facts set forth above, the county board held a special meeting on November 18, 1976, and at that meeting, subsequent to adopting the resolution to consolidate, resolved to reschedule their next regular meeting from Monday, December 6, 1976, to Saturday, December 18, 1976. Later, on December 9, 1976, the board rescheduled the next regular meeting from December 18, 1976, to December 21, 1976, offering as reason the fact that December 18 was a Saturday and offices were closed.

This Court is not aware of any law which prohibits or precludes in any manner the rescheduling of a regular school board meeting. The Guernsey County Board held its annual meeting January 5, 1976, as required by O.R.C. Section 3313.14, and at that meeting fixed the times for holding their regular future meetings as the first Monday of each month. No provision was made by the board for changes in regular meeting dates. Neither was any prohibition made against such changes in regular meeting

dates. The law intends that school boards shall have broad discretion in the exercise of their official duties. The testimony in this case clearly indicates that the reason for the change of dates of regular meetings of the board was to afford the residents of both local school districts the opportunity to pursue their rights to remonstrate against this consolidation issue by way of petition for referendum. Courts should not interfere with boards of education in the performance of their official duties unless fraud or abuse of discretion is indicated. This Court finds that the Guernsey County Board of Education had implied authority to change the date of its regular meeting, that this is the common practice of practically all school boards, and that there is no authority to indicate a contrary view.

Fourth, plaintiffs insist that the procedures followed herein in bringing about a proposal for consolidation of the Zane Trace and Madison school districts violate their constitutional rights to petition, claiming in accordance with the First and Fourteenth Amendments. The evidence indicates that as early as December 7, 1976, certain referendum petition papers were filed with the Guernsey County Board of Education and prior to the time for final filing, 69 petition papers containing 1467 names were filed. It was stated in the testimony that 880 signatures would be required on the referendum petitions to suffice the minimum statutory requirement of 35% of the electors at the last general election. While nothing conclusive can be drawn from mere statistics, the above would clearly indicate that a great many patrons of the two school districts were made aware, if not notified, of the attempted referendum. O.R.C. Section 3311.26 makes no provision for notice to the residents of school districts of a proposal to consolidate. Thus it appears that the legislature intended that sufficient notice was given by the county board when

it mailed the copy of the consolidation proposal and map to the local school boards. Since this Court has already determined that the county board's actions in this respect were legal, and since the issue of the constitutionality of this procedural statute has been decided in the several cases by the Supreme Court of Ohio to be neither in violation of the First and Fourteenth Amendments or of the Ohio Constitution, this Court, in accordance with those decisions, will not disturb the actions taken by the Guernsey Board of Education.

Still within plaintiffs' claim of a violation of constitutional rights is the issue of the rejection of some signatures on the referendum petition papers which came about by rejection of the entire petition papers in accordance with Ohio Revised Code Section 3501.38 (F). Plaintiffs apparently do not question the actions of the Guernsey County Board of Education concerning the board's review of all the petition papers as required in O.R.C. 3311.26, nor do plaintiffs claim that the reasons for rejection of some of the signatures was not proper. Plaintiffs do claim that the rejection of an entire petition paper containing some valid signatures deprives them of their constitutional right to petition. In this case, the right to petition for a referendum was vested in the electors of the two local school districts and they in turn entrusted the circulators of the petitions for referendum to obtain sufficient signatures thereon to place the issue on the ballot legally and properly. The legislature of Ohio has the power to regulate and control the election processes and it has exercised that power and control by the adoption of Section 3501.38 of the Ohio Revised Code. The Courts have found the regulations set forth in the statute to be reasonable, and not so unduly restrictive or burdensome as to be violative of constitutional rights. This Court agrees, and in

this case finds that the county board of education not only had the right, but had the duty imposed by O.R.C. Section 3311.26 to reject certain petition papers, and the exercise of this duty does not unreasonably or unconstitutionally deprive a person whose signature thereon is valid of his rights to petition the government.

Fifth, on December 27, 1976, the new district board of education established the school millage for the tax year at 26.80 mills. O.R.C. Section 5719.01 provides that the lien for real estate taxes attaches on the first day of January of each year even though the amount of the taxes is not determined until later in the year when the taxing districts make their respective tax levies. In this case, the new East Guernsey School District became an effective tax district on the date of the consolidation of the two former local school districts which was December 22, 1976. Since those two former tax districts no longer existed, the newly consolidated district board made a uniform levy throughout the entire new district and established the millage at 26.80. The lien of this tax attached on January 1, 1976. When the boundaries of a taxing district are altered, the power to levy taxes is likewise altered to meet the changes in boundaries. Thus, the taxes based upon the newly-established millage were a valid lien as of January 1, 1976, even though the first half-year tax in accordance therewith was not due and payable until sometime after January 1, 1977. The last half of 1976 tax was not due and payable until later in the year 1977. The distribution of those taxes collected would not be made until the county auditor made his settlement resulting in distribution. The Court finds no violation in any of these procedures of any constitutional provisions of either the Ohio or United States constitutions, either in the nature of a retroactive taxation or contravention of contractual rights.

In summary, the Court finds that the Guernsey County Board of Education properly adopted a resolution proposing the consolidation of the former Zane Trace School District and Madison School District, properly filed copies of the proposal with said school districts, and properly rescheduled their regular meeting date for the obvious purpose of accommodating resident electors of those two school districts in the event they wished to file a petition of referendum against the creation of the proposed new school district. The Court further finds that the Guernsey County Board of Education properly received 69 referendum petition papers containing more than 1450 names, properly receipted the presenters thereof, and properly conducted a review of said petition papers as required by Ohio law. When the Guernsey County Board of Education rejected many of said petition papers for statutory reasons and it became obvious to the board that there were insufficient valid signers to comply with the minimum statutory number, the board acted properly in not certifying the proposal to the board of elections. The resolution of the county board setting the effective date of the consolidation of the two school districts as December 22, 1976, was proper. The newly-created district board of education is not a party hereto but the Court chooses to comment that that board acted according to law when it established the school millage for the tax year 1976 and certified the same to the Guernsey County Auditor. The Auditor thereupon extended the millage upon the tax duplicates and proceeded to bill for the taxes in the manner set forth in the law.

The Court further finds no violation or abridgment of any constitutional rights, either under the Ohio Constitution or the United States Constitution, in any of the respects claimed by plaintiffs arising out of the adequacy of notice as related to the right to petition, or the rejection

of petition papers for referendum, or the adjustment of the millage for school purposes.

The Court finds it unfortunate that this issue was not placed on the ballot because it is in this manner that citizens are given the right to express themselves in response to the acts of various governing bodies. However, there must be statutory direction of the manner in which issues such as this are placed on the ballot for the protection of the right itself. Unfortunately, these directives were not followed in this case. This failure to follow statutory directives rendered the attempted referendum invalid before it ever reached the electorate. Therefore, the issues herein are joined in favor of the defendants and against the plaintiffs. Plaintiffs' requests that the consolidation of the former Zane Trace School District and the Madison School District be declared null and void, and that injunctive relief be granted, are hereby denied. Plaintiffs to pay costs.

/s/ JOHN W. HAZARD
Judge